Supreme Court, U.S.
FILED
DEC 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-140

In The
Supreme Court of the United States
October Term, 1985

MICHAEL J. BOWERS,
Attorney General of Georgia,

Petitioner,

v.

MICHAEL HARDWICK AND
JOHN AND MARY DOE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

MICHAEL J. BOWERS
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DARYL A. ROBINSON
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Counsel for Respondents

*Counsel of Record

Petition for Certiorari Filed July 25, 1985
Certiorari Granted November 4, 1985

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* The opinion of the United States Court of Appeals for the Eleventh Circuit is printed in the Appendix to the Petition for Certiorari at App. 5-35 and will not be reprinted herein.

RELEVANT DOCKET ENTRIES

Complaint	February 14, 1983
Motion of Defendant Lewis Slaton to Dismiss With Memorandum	March 7, 1983
Motion of Defendant Bowers to Dismiss with Brief	April 1, 1983
Motion of Defendant George Napper to Dismiss with Brief	April 18, 1983
Order that Defendant's Motions to Dismiss Are Granted	April 18, 1983
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Judgment in Favor of Defendants	April 22, 1983
Notice of Appeal by Plaintiff	May 19, 1983
Opinion of United States Court of Appeals For the Eleventh Circuit	May 21, 1985
Suggestion for Rehearing En Banc On Behalf of Michael J. Bowers	May 30, 1985
Denial of Suggestion for Rehearing En Banc	June 13, 1985
Petition for Certiorari Filed	July 25, 1985
Certiorari Granted	November 4, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION

FILE NO. C83-0273A

MICHAEL HARDWICK, JOHN DOE and MARY DOE,

Plaintiffs,

vs.

MICHAEL BOWERS, Attorney General of the State of Georgia, LEWIS SLATON, District Attorney for Fulton County, and GEORGE NAPPER, Public Safety Commissioner of the City of Atlanta,

Defendants.

COMPLAINT

(Filed February 14, 1983)

1.

This is an action for a declaratory judgment that Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002) is unconstitutional, insofar as it makes consensual sodomy a crime, in violation of the Plaintiffs' constitutional right of privacy.

2.

Jurisdiction

Plaintiffs invoke this Court's jurisdiction under the 1st, 3rd, 4th, 5th, 9th and 14th Amendments to the United States Constitution, 28 U.S.C. 1331, 1343 (3) and (4), 42 U.S.C. 1983 and 1988, and 28 U.S.C. 2201 and 2202.

3.

Venue

Venue is proper in this district under 28 U.S.C. 1391 (B) since it is the district in which the claim arose.

4.

Parties

Plaintiff MICHAEL HARDWICK is a citizen of the United States, residing in the City of Atlanta, Fulton County, Georgia. He is 29 years of age. HARDWICK is a practicing homosexual, who regularly engages in private homosexual acts and will do so in the future.

5.

Plaintiffs JOHN and MARY DOE are a lawfully married couple who seek to engage in sexual activity now proscribed by Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002) in the privacy of their home.

6.

Defendant MICHAEL BOWERS is sued in his official capacity as the Attorney General of the State of Georgia, charged with the State-wide enforcement and administration of the challenged statute.

7.

Defendant LEWIS SLATON is the District Attorney for Fulton County, Georgia, and is charged with the enforcement and administration of the challenged statute in Fulton County.

8.

Defendant GEORGE NAPPER is the Public Safety Commissioner of the City of Atlanta, and is sued in his official capacity. It is his duty to formulate rules and regulations for the operation of the bureau of police services, and to enforce applicable laws and ordinances, including the challenged statute.

Facts

9.

On or about August 3, 1982, Plaintiff MICHAEL HARDWICK was arrested by a member of the Atlanta City Police Department and charged with committing the crime of sodomy, a violation of Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002), in the bedroom of his own home.

10.

On September 14, 1982, Plaintiff HARDWICK appeared in the Municipal Court of the City of Atlanta to answer the charge, and the case was transferred to the Superior Court of Fulton County.

11.

The case has not been presented to the grand jury, and the District Attorney's Office has stated that it will not be presented unless further evidence develops (see letter attached as Exhibit A). There is now no pending criminal prosecution in Georgia against Plaintiff HARDWICK.

12.

Plaintiffs JOHN and MARY DOE have been chilled and deterred from engaging in personal, private sexual activity by the existence of the Georgia sodomy statute and the recent arrest of Plaintiff HARDWICK.

13.

Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002) provides in pertinent part:

> "A person commits sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . A person convicted of sodomy shall be punished by imprisonment for not less than one nor more than 20 years."

14.

The Georgia statute makes it a crime for all persons—including married people, unmarried people, and homosexuals—to engage in private, consensual sodomy.

15.

Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002), as administered and enforced by defendants, places Plaintiff HARDWICK and all other practicing homosexuals in imminent danger of arrest, prosecution and imprisonment.

16.

Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002) imposes a burden upon and significantly interferes with the decisions of Plaintiffs JOHN and MARY DOE in their personal, private sex life.

17.

Plaintiffs have no adequate remedy at law.

Cause of Action

18.

Sexual conduct in private between consenting adults is protected by a fundamental right of privacy, guaranteed by the 1st, 3rd, 4th, 5th, 9th and 14th Amendments to the United States Constitution.

19.

Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002) is unconstitutional in that:

(a) It violates the Due Process Clause of the Fourteenth Amendment, in that there is no compelling state interest which would justify the statute's interference with Plaintiffs' fundamental right of privacy;

(b) In the alternative, it violates the Due Process Clause of the Fourteenth Amendment in that there is no rational relationship between any legitimate state purpose and the statute at issue;

(c) The statute is unconstitutionally overbroad in that it does not distinguish between public and private activities. The statute purports to reach private consensual conduct as well as unprotected public acts;

(d) The statute violates the guarantees of the First Amendment, by depriving Plaintiffs' of their freedom of expression and association, rights protected by the Fourteenth Amendment.

WHEREFORE, Plaintiffs pray:

(a) That Official Code of Georgia Annotated § 16-6-2 (Ga. Code Ann. 26-2002) be declared unconstitutional;

(b) Plaintiffs be awarded their costs and attorney's fees under 42 U.S.C. 1988;

(c) All such other and further relief as this Honorable Court deems just and proper.

HAZLETON & SWEET, P.C.
/s/ Kathleen L. Wilde
/s/ John F. Sweet

950 South Omni Int'l
Atlanta, GA 30303
(404) 688-6700

/s/ Louis Levenson
ATTORNEYS FOR PLAINTIFFS

990 Edgewood Avenue, N.E.
Atlanta, GA 30307
(404) 577-7103

EXHIBIT A

LEWIS R. SLATON

District Attorney—Atlanta Judicial Circuit
Third Floor Courthouse • Atlanta, Georgia 30303

January 7, 1983

Mr. Louis Levenson
Attorney At Law
990 Edgewood Avenue N.E.
Atlanta, Georgia 30307

RE: Michael Hardwick

Dear Louis,

This is to confirm our position on the above-styled case. Michael Hardwick and his co-defendant cases were not presented to the Grand Jury on October 7, 1982. Unless further evidence develops, the cases will remain as not presented to the Grand Jury.

Sincerely,

/s/ Kenneth L. Marshall
Assistant District Attorney
Atlanta Judicial Circuit

KLM:jnb

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION

FILE NO. C83-273A

MICHAEL HARDWICK, et. al.,

Plaintiffs

vs.

MICHAEL BOWERS, Attorney General of Georgia;

LEWIS SLATON, District Attorney, et. al.,

Defendants

MOTION TO DISMISS OF DEFENDANT LEWIS SLATON

(March 7, 1983)

Now comes LEWIS SLATON, District Attorney for the Atlanta Judicial Circuit of Georgia, and defendant herein, and files this Motion to Dismiss, and respectfully shows the Court as follows:

1.

The above-styled case should be dismissed in its entirety because it fails to state a claim upon which relief may be granted. *Fed. R. Civ. P.* 12(b)(6).

2.

The above-styled case should be dismissed as to defendant LEWIS SLATON because it fails to state a justiciable controversy, or is one which is ripe for decision.

3.

This Court should abstain from deciding this case, because it presents an issue of State criminal law which has not been presented to or decided by the Supreme Court of Georgia.

4.

This Court should not award Attorneys fees as against Defendant Slaton who is sued in his official capacity only, and who, in his official capacity, is absolutely immune.

WHEREFORE, the defendant LEWIS SLATON respectfully prays that this action be dismissed, and the costs thereof taxed against the plaintiffs.

Respectfully,

LEWIS R. SLATON
DISTRICT ATTORNEY
ATLANTA JUDICIAL CIRCUIT
By /s/ H. Allen Moye
Assistant District Attorney
Atlanta Judicial Circuit

Third Floor Courthouse
136 Pryor Street, S.W.
Atlanta, Georgia 30335
(404) 572-2539

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION

FILE NO. C83-272A

MICHAEL HARDWICK,
et. al.,

Plaintiffs

vs.

MICHAEL BOWERS, Attorney
General of Georgia;
LEWIS R. SLATON, District
Attorney, et. al.,

Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the within and foregoing pleadings upon the following attorneys of record for plaintiffs and parties at interest by mailing copies of same, postage prepaid, to:

Kathleen L. Wilde
John F. Sweet
Attorneys at Law
950 South Omni International
Atlanta, Georgia 30303

Louis Levenson
Attorney at Law
990 Edgewood Avenue, N.E.
Atlanta, Georgia 30307

Honorable Michael Bowers
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Ms. Marva Jones Brooks
City Attorney
City of Atlanta, Department of Law
2000 Bank of the South Building
Atlanta, Georgia 30303

This 7th day of March, 1983.

/s/ H. Allen Moye
Attorney for Lewis Slaton

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C83-0273A

MICHAEL HARDWICK, et al.,

Plaintiffs,

v.

MICHAEL BOWERS, etc., et al.,

DEFENDANT MICHAEL BOWERS' MOTION TO DISMISS

(Filed April 1, 1983)

Comes now Michael J. Bowers, Attorney General for the State of Georgia, and, pursuant to Fed. R. Civ. P. 12(b)(6), moves the court to dismiss the complaint in the above-styled case on the grounds that it fails to state a claim for which relief can be granted. This motion is based upon the brief which is filed herewith.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant Attorney General

/s/ MARION O. GORDON
First Assistant Attorney General

/s/ JOHN C. WALDEN
Senior Assistant Attorney General

/s/ GEORGE M. WEAVER
Assistant Attorney General

Please serve:

GEORGE M. WEAVER
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-2976

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Defendant Michael Bowers' Motion to Dismiss and Brief in Support of Defendant Michael Bowers' Motion to Dismiss, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Kathleen L. Wilde, Esq.
John F. Sweet, Esq.
950 South Omni International
Atlanta, Georgia 30303

Louis Levenson
990 Edgewood Avenue, N.E.
Atlanta, Georgia 30307

H. Allen Moye, Esq.
Assistant District Attorney
Third Floor Courthouse
136 Pryor Street, S.W.
Atlanta, Georgia 30305

Marva Brooks, Esq.
City of Atlanta
Department of Law
2000 Bank of the South Building
Atlanta, Georgia 30303

This 1st day of April, 1983.

/s/ GEORGE M. WEAVER
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C83-0273A

MICHAEL HARDWICK, et al.,

Plaintiffs,

v.

MICHAEL BOWERS, etc., et al.,

Defendants.

DEFENDANT GEORGE NAPPER'S MOTION TO DISMISS

(Filed April 18, 1983)

Comes now the defendant, George Napper, and moves the court to dismiss the complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ Marva Jones Brooks
/s/ Alford J. Dempsey, Jr.
/s/ George R. Ference

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the within and foregoing pleadings upon the following attorneys of record for plaintiffs and parties at interest by mailing copies of same, postage prepaid, to:

Kathleen L. Wilde
John F. Sweet
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950 South Omni International
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Louis Levenson
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990 Edgewood Avenue, N.E.
Atlanta, Georgia 30307

George M. Weaver
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Honorable Michael Bowers
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

H. Allen Moye
Assistant District Attorney
Third Floor Courthouse
136 Prior St.
Atlanta, Georgia 30335

This 18th day of April, 1983.

/s/ George R. Ference
Attorney for defendant, George Napper

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C83-273A

MICHAEL HARDWICK, et al.,

Plaintiffs,

vs.

MICHAEL BOWERS, et al.,

Defendants.

ORDER

(Filed April 18, 1985)

Plaintiffs, a male homosexual and a married couple, seek a declaratory judgment that Official Code of Georgia Annotated § 16-6-2 is unconstitutional, insofar as it makes consensual sodomy a crime. Plaintiffs allege that the statute violates their constitutional rights of privacy, due process, and freedom of expression and association. Defendants, Michael Bowers, Attorney General of Georgia, and Lewis Slaton, District Attorney of Fulton County, have filed motions to dismiss for failure to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6). Additionally, it is argued that there is no justiciable controversy as to the married couple, the Does.

The statute in question provides in pertinent part:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . .

> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . .

As to plaintiffs Doe, the court must agree that their allegations do not create a justiciable controversy. The Does allege that they are a married couple who seek to engage in sexual activity proscribed by O.C.G.A. § 16-6-2 in the privacy of their home. Additionally, they allege that they have been chilled and deterred from engaging in the activity by the existence of the statute and the recent arrest of plaintiff Hardwick for sodomy under the statute. Hardwick's case, however, has not been presented to the grand jury, and the District Attorney's Office has stated that it will not be presented unless further evidence develops.

The Does do not allege that they have been threatened with prosecution or that any other married couple has been prosecuted or threatened with prosecution under the statute. Even though plaintiff Hardwick was arrested, he has not been prosecuted. Like the married couple in *Poe v. Ullman,* 367 U.S. 497, 505 (1961), the Does are unable to show that they have sustained or are in immediate danger of sustaining some direct injury as a result of the statute's enforcement. *See also Roe v. Wade,* 410 U.S. 113, 127-29 (1973).

As to plaintiff Hardwick, his arguments are foreclosed by the Supreme Court's affirmance of a three-judge district court decision upholding the constitutionality of the Virginia sodomy statute. *Doe v. Commonwealth's Attorney for the City of Richmond,* 403 F. Supp. 1199 (E.D.

Va. 1975), *aff'd*, 425 U.S. 901 (1976). The Virginia statute challenged in that case is quite similar to the Georgia legislation in question here, and all the constitutional arguments made by Hardwick here were rejected in *Doe*.

For these reasons, the motions to dismiss are GRANTED.

So ORDERED this 15 day of April, 1983.

/s/ Robert H. Hall
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C83-273A

MICHAEL HARDWICK, et al.,

Plaintiffs,

vs.

MICHAEL BOWERS, et al.,

Defendants.

ORDER

(Filed April 22, 1983)

Defendant Napper's motion to dismiss is GRANTED for the same reasons stated in this court's order dated April 15, 1983 granting defendants, Michael Bowers, Attorney General of Georgia, and Lewis Slaton, District Attorney of Fulton County motions to dismiss.

So ORDERED this 22nd day of April, 1983.

/s/ Robert H. Hall
United States District Judge

JUDGMENT ON DECISION BY THE COURT
FOR THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

CIVIL ACTION DOCKET NO. C83-273A

MICHAEL HARDWICK

Plaintiff

vs.

JOHN DOE, MARY DOE, MICHAEL BOWERS,
Attorney General, LEWIS SLATON, et al

Defendants

JUDGMENT

This action came on for hearing before the court, United States District Judge ROBERT H. HALL presiding. The issues having been duly heard and a decision having been duly rendered, granting defendants' motions for summary judgment, IT IS ORDERED AND ADJUDGED that the plaintiff, MICHAEL HARDWICK take nothing, that action be dismissed and that the defendants recover their costs of Action.

Dated at: Atlanta, Georgia
Filed and entered in the Clerk's office: 4/22/82
BEN H. CARTER, CLERK

By: Danny Brown
Deputy Clerk of the Court
Date: April 22, 1983
BEN H. CARTER, CLERK

By: Danny Brown
Deputy Clerk of the Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C83-273A

MICHAEL HARDWICK, et al.,

Plaintiffs,

vs.

MICHAEL BOWERS, et al.,

Defendants.

NOTICE OF APPEAL

(Filed May 19, 1983)

Notice is hereby given that the Plaintiffs in this action hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the judgment entered April 22, 1983, granting defendants' motions for summary judgment and dismissing the action, and the Court's order of May 17, 1983, denying Plaintiffs' motion for reconsideration.

This 19 day of May, 1983.

Hazleton & Sweet, P.C.
Kathleen L. Wilde
Attorney for Plaintiffs

950 South Omni Int'l
Atlanta, GA 30303
(404) 688-6700

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the within and foregoing pleading upon defendants by mailing copies of the same, postage prepaid, addressed as follows:

George M. Weaver
Assistant Attorney General
132 State Judicial Building
Atlanta, GA 30334

H. Allen Moye
Assistant District Attorney
Third Floor Courthouse—136 Pryor Street
Atlanta, GA 30303

George R. Ference
Suite 1100 South
Omni International
Atlanta, GA 30303

This 19 day of May, 1983.

Kathleen L. Wilde
Attorney for Plaintiffs